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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 174

NEAL MERLE SMITH,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN.

Respondent.

No. 177

RICHARD W. MARSHALL,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT

EVAN HULTMAN
Attorney General of Iowa
Des Moines, Iowa
Counsel for Respondent

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Summary of Argument

In Iowa, paupers are allowed to appeal from criminal convictions without prior payment of filing fees (section 789.20, 1958 Code of Iowa), and free transcripts are provided by the county to be used in such appeals (section 793.8, 1958 Code of Iowa). Hence, indigent criminal defendants are not deprived of appellate review of the criminal proceedings by which they were convicted. The State of Iowa, therefore, conforms to the decisions rendered by this Court in *Burns v. Ohio*, 360 U. S. 252 and *Griffin v. Illinois*, 351 U. S. 12.

Habeas corpus is a civil action brought by a prisoner to obtain his personal liberty—not by the state to punish him for his crime. *Ex Parte Tom Tong*, 108 U. S. 556. It is a new suit begun by the prisoner and, by requiring a filing fee, the State of Iowa is not exacting a price which a defendant must pay to defend himself.

Many of our civil rights, including the right to personal liberty, are highly privileged in American law. The statutes of Iowa which require filing fees to be paid apply to all civil actions brought to enforce these rights. Respondent submits that if these statutes are unconstitutional as applied to one such right, then they must be unconstitutional as to all.

Respondent further submits that the convicted criminal's right to habeas corpus is a statutory right (section 663.5, 1958 Code of Iowa), and that the legislature of Iowa may extend or limit its application without depriving petitioners of constitutional rights.

Though indigent convicted criminals are unable to file a petition for habeas corpus in Iowa, they may proceed in the federal courts for the vindication of federal rights alleged to have been denied by the state. 28 U.S.C. § 2254

(Supp. 1950) provides that a habeas corpus action may be brought in the federal courts whenever circumstances exist which render state process "ineffective to protect the rights of the prisoner." The poverty of one seeking habeas corpus could be viewed by a federal court as such a circumstance.

Respondent urges, therefore, that this Court hold sections 606.15 and 685.3, 1958 Code of Iowa, constitutional as applied to habeas corpus proceedings.

Argument

A. Burns v. Ohio, 360 U.S. 252, and Griffin v. Illinois, 351 U.S. 12, Were Concerned With Direct Attacks Upon Criminal Convictions Through the Process of Criminal Appeals.

As stated by the petitioners, at page 9 of their brief, the question presented in *Burns v. Ohio*, 360 U. S. 252, was "whether a state may constitutionally require an indigent defendant in a *criminal* case to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts." This Court held that the denial of the right of an indigent criminal defendant to appeal by the imposition of financial barriers was a denial of rights guaranteed by the 14th Amendment to the United States Constitution.

In *Griffin v. Illinois*, 351 U. S. 12, cited by the petitioners at page 11 of their brief, this Court held that the State of Illinois could not constitutionally refuse to provide a transcript to an indigent *criminal* defendant seeking to appeal because of his inability to pay for such transcript.

In Iowa, indigents may appeal from criminal convictions without prior payment of filing fees (section 789.20, 1958 Code of Iowa), and transcripts are provided by the county to be used in such appeals (section 793.8, 1958 Code of

Iowa). The State of Iowa, therefore, conforms to the decisions in the *Burns* and *Griffin* cases.

Obviously, these cases were concerned with the rights of a convicted criminal seeking to make a direct attack upon his conviction by appeal to a court of review. Such a direct attack can generally be made only once, and errors of the trial court are not subject to collateral attack. *Riddle v. Dyche*, 262 U. S. 333. These cases teach that to deny the right of appeal because of financial inability to pay costs in advance is to deny, to some, a most important portion of the criminal action against them. As an appeal is a part of the criminal proceeding itself, it is the denial of the full right of the accused to defend himself.

It is submitted that an entirely different question is presented by the case at bar.

B. The Rule of Burns v. Ohio, 360 U.S. 252, Should Not Be Extended to Habeas Corpus Proceedings.

1. Habeas Corpus is a Civil Action.

The classification of habeas corpus as a civil action is well settled by decisions of this Court and of the Supreme Court of Iowa. *Riddle v. Dyche*, 262 U. S. 333; *Cross v. Burke*, 146 U. S. 82; *Ex Parte Tom Tong*, 108 U. S. 556; *Orr v. Jackson*, 149 Iowa 641, 128 N. W. 958; *Stevenson v. Collins*, 54 Iowa 441, 6 N. W. 692.

This classification was not made arbitrarily or without due consideration. Nowhere has the definite distinction between habeas corpus and criminal prosecution been more clearly set forth than by the Supreme Court of the United States in *Ex Parte Tom Tong*, 108 U. S. at 559:

"Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes

are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under criminal process . . . the proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime."

The State of Iowa, in requiring a convicted criminal to pay a filing fee to petition for a writ of habeas corpus, is not exacting a price for the right of an accused to defend himself against a criminal prosecution. The State is now, in effect, the defendant in civil action brought by an individual for the purpose of enforcing a civil right. The petitioner has taken the affirmative. The burden is his. The action which he brings, like other civil actions, may be filed again and again whenever new grounds therefor are alleged to exist. In fact, it can be abused. See *Dorsey v. Gill*, 148 F. 2d 857; 862-64; *State v. Boy*, 102 A. 2d 684, 885 (N.J. 1954). Section 663.44, 1958 Code of Iowa, provides that the costs of a habeas corpus action shall be taxed to the defendant, "if the plaintiff is discharged." Why should the State be required to pay such costs without regard to the merits of the claim? Must the defendant financially aid the plaintiff to bring suit?

It should be noted, at this point, that the filing fees required to institute civil actions, including habeas corpus, in Iowa are extremely nominal in amount ($4.00—not $400.00), and the respondent submits that the difference matters a great deal. It is difficult to envision a situation where a prospective plaintiff could not meet this require-

ment. Even prisoners, in Iowa, are gainfully employed (section 246.18, 1958 Code of Iowa).

Respondent does not deny that the right to personal liberty is highly prized and protected by our society. Nor would he deny that our rights to freedom of worship, free press, free speech, and many others, are also highly prized and protected. These most fundamental rights are all civil in nature and civil actions may be brought to enforce them whenever they are threatened. The filing fees required by sections 606.15 and 685.3, 1958 Code of Iowa, are applicable to all such civil actions. If these statutes are unconstitutional as applied to the enforcement of one of these most basic liberties, then surely they must be unconstitutional as to all.

2. The "Right" of a Convicted Criminal to Habeas Corpus is Granted by Statute—Not by the Constitution.

Although the writ of habeas corpus has come to be used to the greatest extent by convicted criminals, this group was historically excepted from those who might make use of it. The Habeas Corpus Act of 1679, 31 Car. II, c. 2, required the lord chancellor and any of the judges of the superior courts to issue the writ in vacation in term, *unless* the prisoner was committed for treason or felony, *or was in prison on conviction for crime or in execution.* There is nothing in our Federal Constitution or the Constitution of Iowa which indicates that habeas corpus must be made available to convicted criminals. See Collings, *Habeas Corpus for Convicts —Constitutional Right or Legislative Grace?*, 40 Calif. Law Rev. 335 at 356-57, wherein Mr. Collings states:

> "What must not be forgotten is that all of this vastly expanded right of habeas corpus for convicts came not from the Constitution but from the Act of 1867; 'the recent decisions have not arisen out of the ancient tra-

dition nor do the causes from which they spring involve the traditional incidents of wrongful confinement.' . . . "

"The only constitutional basis for these decisions is that the 1867 Act specifically provides for relief where a person is restrained of liberty 'in violation of the Constitution.' And it is considered to be implicit in the due process clause that where a conviction is rendered in violation of a constitutional right a corrective process ought to be supplied, and will be supplied wherever possible. But there is nothing in any of those decisions which would require that Congress and the states supply a corrective process. And certainly nothing in any of the decisions would require that the corrective process be habeas corpus."

Article I, Sec. 9, of the Constitution of the United States, and Article I, Sec. 13, of the Constitution of the State of Iowa do not specify those who are entitled to apply for the writ, nor do they prescribe rules governing the issuance thereof. In Iowa, these matters are governed by the provisions of Chapter 663, 1958 Code of Iowa. Filing fees required to be paid to bring this action are those required for the filing of actions in replevin, mandamus, quo warranto, partition, quieting title, and nearly every other type of civil proceeding.

It is clear that habeas corpus is a statutory civil remedy and it is urged by respondent that the writ should remain subject to the same statutory regulation as other civil remdies.

C. An Indigent Prisoner Seeking Habeas Corpus Has Recourse to the Federal Courts.

An imprisoned pauper, who seeks relief by habeas corpus, is not without recourse to vindicate the denial of a Federal

Constitutional right. As stated by this Court in *Ex Parte Hawk*, 321 U. S. 114 at page 118:

> ". . . where resort to state court remedies has failed to accord a full and fair adjudication of the Federal contention raised, either because the state affords no remedy . . ., or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. Moore v. Dempsey, 261 U. S. 86, Ex Parte Davis, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. In such case he should proceed in the federal district court before resorting to this Court by petition for habeas corpus."

See *White v. Ragen*, 324 U. S. 760, 764-65.

Habeas corpus may be brought *in forma pauperis* in the federal courts. 28 U. S. C. §§ 1915, 2250 (Supp. 1950).

Although one federal court has ruled that the inability to pay state filing fees in bringing a habeas corpus action did not exhaust available state remedies, *Willis v. Utecht*, 185 F. 2d 210 (8th Cir. 1950), cert. denied, 340 U. S. 915, other federal courts have taken a contrary view. *U. S. ex rel. Pugce v. Cummings*, 233 F. 2d 190 (2d Cir. 1956), cert. denied, 352 U. S. 854; *Robbins v. Green*, 218 F. 2d 192 (1st Cir. 1954); *Dolan v. Alvis*, 186 F. 2d 586 (6th Cir. 1951), cert. denied, 342 U. S. 906.

It is submitted that the federal Judicial Code provides an alternative to the exhaustion rule which may be exercised to protect the rights of the indigent prisoner. This alternative is set forth in 28 U.S.C. § 2254 (Supp. 1950), which codifies the exhaustion rule and provides, in part, as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" (Emphasis added.)

In the case of an indigent who is unable to pay state filing fees, there would exist circumstances rendering the state process "ineffective to protect the rights of the prisoner." This Court made reference to this alternative in *Frisbie v. Collins*, 342 U. S. 519, at pages 520-21:

"There is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is 'available state corrective process.' 62 Stat. 967, 28 U.S.C. § 2254. As explained in Darr v. Burford, 339 U. S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals."

See *Darr v. Burford*, 339 U. S. 200, 210.

Robbins v. Green, supra, at page 195, squarely held that a prisoner's inability to pay filing fees in the state court constituted a circumstance, "rendering such process ineffective to protect the rights of the prisoner."

Habeas Corpus is an available post-conviction civil remedy in the State of Iowa. It is conceded that one's inability to pay a nominal filing fee, to wit: $4.00, may render this

remedy ineffective to protect his rights, but it is submitted that he may then proceed in the federal courts to obtain vindication of any federal rights which may have been denied him.

Conclusion

As stated by petitioners at page 31 of their brief, "The Fourteenth Amendment means that in criminal proceedings rich and poor are to be treated with an equal hand." The Supreme Court of the United States and the Supreme Court of Iowa have determined that habeas corpus is a civil proceeding—not a criminal proceeding. Questions of our liberties have long been decided in civil actions brought to enforce them, and, in Iowa, one who institutes a civil action must pay a reasonable filing fee. To require the state to pay the filing fee of the plaintiff in a civil action would be to discriminate against those who can afford to pay, against the defendant, and against the State itself.

The State must provide a judicial system accompanied by the necessary administrative facilities required for its operation. Should not those who make use of our courts to enforce their fundamental civil liberties bear, at least, a nominal share of the burden?

It is submitted that the extension of the *Burns* rule to one of these basic liberties would require its extension to all. Even if its application were restricted to habeas corpus, the extension would include such obviously non-criminal matters as child custody and confinement for mental illness.

It is further submitted that such a holding would reverse a well-reasoned position of long standing taken by this Court—that habeas corpus is a civil action, and would, in effect, require every state to make the civil action of habeas corpus its criminal post-conviction remedy.

Respondent therefore urges that this Court uphold the constitutionality of sections 606.15 and 685.3, 1958 Code of Iowa, as applied to habeas corpus proceedings.

Evan Hultman
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Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

Nos. 174 AND 177.—OCTOBER TERM, 1960.

Neal Merle Smith, Petitioner, 174 v. John E. Bennett, Warden. Richard W. Marshall, Petitioner, 177 v. John E. Bennett, Warden.	On Writs of Certiorari to the Supreme Court of Iowa.

[April 17, 1961.]

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue in these habeas corpus cases concerns the validity, under the Equal Protection Clause of the Fourteenth Amendment, of the requirement of Iowa law that necessitates the payment of statutory filing fees[1] by an indigent prisoner of the State before an application for a writ of habeas corpus or the allowance of an appeal in such proceedings will be docketed. As we noted in *Burns* v. *Ohio*, 360 U. S. 252, 256 (1959), "[t]he State's commendable frankness in [these] . . . case[s] has simplified the issues. In its brief, the State conceded that "indigent convicted criminals are unable to file a petition for habeas corpus in Iowa." We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.

[1] Iowa Code Ann. (Cum. Supp. 1960) § 606.15 provides in pertinent part that "[t]he clerk of the district court shall charge and collect . . . [f]or filing any petition . . . and docketing the same, four dollars." Section 685.3 states in relevant part that "[t]he clerk [of the Supreme Court] shall collect . . . [u]pon filing each appeal, three dollars."

In No. 174, *Neal Merle Smith* v. *John E. Bennett, Warden*, the petitioner was convicted and sentenced to serve 10 years in the state penitentiary for the offense of breaking and entering. In due course he was released on parole. After a short period, however, this was revoked for violation of its conditions. Petitioner was arrested and was thereafter returned to the penitentiary for completion of his sentence. He then forwarded to the Clerk of the District Court of Lee County, Iowa, a petition for a writ of habeas corpus with accompanying motion to proceed *in forma pauperis* and an affidavit of poverty. In the petition he raised constitutional questions as to the validity of the warrant of arrest under which he was taken into custody and returned to the penitentiary. The Clerk refused to docket the petition without payment of the $4 filing fee. Petitioner then filed a motion in the Iowa Supreme Court for leave to appeal *in forma pauperis*, together with a pauper's oath, which the court denied without opinion. On appeal to this Court, we dismissed the appeal but treated the papers as a petition for certiorari, which was granted, limited to the above question. 363 U. S. 834.

In No. 177, *Richard W. Marshall* v. *John E. Bennett, Warden*, the petitioner, who was represented by counsel, pleaded guilty to an information charging the offense of breaking and entering and was sentenced to 10 years' imprisonment at the Iowa State Penitentiary. A year later he forwarded to the Clerk of the District Court of Lee County, Iowa, a petition for a writ of habeas corpus alleging that he was detained "contrary to the provisions of the 14th Amendment, § 1" because the information to which he pleaded guilty was "fatal on its face" in that "it does not charge Petitioner with 'intent' " and further because his "plea thereon was obtained by coercion and duress." Accompanying the petition was a motion for leave to proceed *in forma pauperis* and a pauper's affi-

davit. Thereafter, in an unreported written order, the court refused to docket the petition without the payment of the statutory filing fee but, nevertheless, examined the petition and found it "would have to be denied if properly presented to the Court." Petitioner forwarded appeal papers to the Supreme Court of Iowa but that application was also denied. Petitioner's motion to proceed here *in forma pauperis* was granted, as was his petition for certiorari, which was limited to the question posed in the opening paragraph, *supra*. 363 U. S. 838.

In *Burns* v. *Ohio*, *supra*, we decided that a state could not "constitutionally require . . . an indigent defendant in a criminal case [to] pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts." At p. 253. That decision was predicated upon our earlier holding in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), that an indigent criminal defendant was entitled to a transcript of the record of his trial, or an adequate substitute therefor, where needed to effectively prosecute an appeal from his conviction. The gist of these cases is that because "[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants," *Burns* v. *Ohio*, *supra*, at 257–258, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin* v. *Illinois*, *supra*, at 19, and consequently that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Burns* v. *Ohio*, *supra*, at 258. Iowa had long anticipated the rule announced in these cases, *i. e.*, indigent defendants may appeal from criminal convictions without prior payment of filing fees, Iowa Code § 789.20 (enacted in 1917), and transcripts are provided by the county to be used in such appeals, Iowa Code § 792.8 (enacted in 1872). As

the State points out, those cases "were concerned with the rights of a convicted criminal seeking to make a direct attack upon his conviction by appeal . . . ." Habeas corpus, on the other hand, is not an attack on the conviction but on the validity of the detention and is, therefore, a collateral proceeding. The State, however, admits that the Great Writ "is an available post conviction civil remedy in . . . Iowa" and concedes that a prisoner's inability to pay the $4 fee would render it unavailable to him. The question is therefore clearly posed: Since Iowa does make the writ available to prisoners who have the $4 fee, may it constitutionally preclude its use by those who do not?

The State insists that it may do so for three reasons. First, habeas corpus is a civil action brought by a prisoner to obtain his personal liberty, a civil right, and if it must be made available to indigents free of fees in protection of that right then it must be made available in like manner to all indigents in the protection of every civil right. Second, habeas corpus is a statutory right, Iowa Code § 663.5, and the legislature may constitutionally extend or limit its application. Finally, a habeas corpus action may be brought in the United States District Court because Iowa's fee requirement fulfills the demand of 28 U. S. C. § 2254, that "the existence of circumstances rendering such [state corrective] process ineffective to protect the rights of the prisoner" be present.

While habeas corpus may, of course, be found to be a civil action for procedural purposes, *Ex parte Tom Tong*, 108 U. S. 556 (1883), it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. The State admits that each petitioner here is an indigent and that its requirement as to the $4 fee payment has effectively denied them the use of the writ. While

$4 is, as the State says, an "extremely nominal" sum, if one does not have it and is unable to get it the fee might as well be $400—which the State emphasizes it is not. In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law for any man that is imprisoned." 3 Howell's State Trials 95 (1628). The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels. Ever since the Magna Charta, man's greatest right—personal liberty—has been guaranteed, and the procedures of the Habeas Corpus Act of 1679[2] gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its "privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's "freedom writ" by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," *Bowen* v. *Johnston*, 306 U. S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State,

[2] 31 Car. II, c. 2.

financial hurdles must not be permitted to condition its exercise.

To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payment does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only upon them.

The Attorney General of Iowa also argues that indigent prisoners in the State's custody may seek "vindication of federal rights alleged to have been denied by the state" in the federal courts. But even though this be true—an additional point not involved or passed upon here—it would ill-behoove this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrongs: "Go to the federal court." Moreover, the state remedy may offer review of questions not involving federal rights and therefore not raisable in federal habeas corpus.

Because Iowa has established such a procedure, we need consider neither the issue raised by petitioners that the State is constitutionally required to offer some type of post-conviction remedy for the vindication of federal rights, nor the State's converse claim that the remedy is a matter of legislative grace. However, the operation of the statutes under attack has, perhaps inadvertently, made it available only to those persons who can pay the necessary filing fees. This is what it cannot do.

Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained. Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal

scale, and its hand extends as far to each. In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws. The judgments of the Supreme Court of Iowa are vacated and each cause is remanded to that court for further action consistent with this opinion.

Vacated and remanded.